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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 61

HAROLD L. ICKES, Secretary of the Interior, and DAN H. WHEELER, Director of the Bituminous Coal Division of the Department of the Interior, Petitioners

v.

ASSOCIATED INDUSTRIES OF NEW YORK STATE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S CROSS-MOTION TO DISMISS THE WRIT OF CERTIORARI AND TO REMAND

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Respondent moves the Court to dismiss the writ of certiorari granted June 14, 1943 and to remand this cause to the Circuit Court of Appeals for the Second Circuit with directions to dismiss the petition herein without prejudice and without cost to either party, on the ground that this proceeding and the cause have become moot.

The motion is based upon the fact that the Bituminous Coal Act of 1937*, upon the provisions of which this cause is founded, expired August 24, 1943.

* Act of April 26, 1937, c. 127, 50 Stat. 72, 15 U. S. C., Sec. 828, *et seq.*, as extended April 11, 1941, 55 Stat. 134, 15 U. S. C., Supp. I, Sec. 849 and amendment of April 24, 1943, P. L. 40, 78th Cong., 1st sess., c. 68, H. J. Res. 113 and amendment of May 21, 1943, P. L. 53, 78th Cong., 1st sess., c. 97, H. J. Res. 122.

The Solicitor General has moved this Court to *reverse* the order of the Circuit Court of Appeals for the Second Circuit entered March 3, 1943 and to remand the cause with directions to *vacate* its order and dismiss the petition for the reason that the cause has become moot.

Respondent opposes those portions of the motion of the Solicitor General which request this Court to reverse the order of the Circuit Court of Appeals and to direct that Court to vacate its order entered March 3, 1943.

The order of the Circuit Court denied a motion of Petitioners Ickes and Wheeler (respondents below) for an order dismissing the petition of the Respondent in the Circuit Court of Appeals for alleged lack of status on the part of the Respondent to maintain its petition to review orders of the Petitioners Wheeler and Ickes dated, respectively, August 28 and September 30, 1942, which directed increases in minimum prices of bituminous coal.

Although this proceeding and this cause have become moot by the expiration of the Coal Act, the cause was not moot when the Circuit Court of Appeals entered its order sustaining Respondent's status as petitioner below and the order was, therefore, validly made. The order of the Circuit Court of Appeals did not (and does not now) constitute any restraint upon or interference with any rights of the Petitioners Ickes and Wheeler or either of them. Furthermore, no other judgment, decree or injunction has been entered in the court below, the continuance of which constitutes any restriction or interference with the freedom of action of the Petitioners Ickes and Wheeler. There is, therefore, no necessity for the reversal or the vacating of the order of the Circuit Court of Appeals. The Solicitor General has not stated any facts as a basis for those portions of the motion on behalf of Petitioners which request the reversal and vacating of the order of the Circuit Court of Appeals.

The disposition of this appellate proceeding and of the cause, now to be made by this Court, should not tend to prejudice or embarrass the Respondent. In dismissing this proceeding and remanding the cause nothing should now be done by this Court which may be construed as a determination upon the merits. It is unnecessary for this Court to determine whether the Respondent could maintain the proceeding as originally commenced. Justice requires that in disposing of this cause at this time by reason of the expiration of the statute under which the cause arose this Court should do nothing more than is necessary to terminate the litigation. Any direction now made by this Court should not, either directly or by implication, produce a result which is favorable to one party and unfavorable to the other. Moreover, there should be no award of costs to either party as against the other.

In the circumstances, it is respectfully submitted that there being no judgment, decree or order which now affects any of the rights of Petitioners Ickes and Wheeler, a proper disposition of the appellate proceeding which brought the cause here and of the entire cause will be accomplished by (1) dismissing the writ of certiorari and (2) remanding the cause to the Circuit Court of Appeals for the Second Circuit with directions to dismiss the petition in that court without prejudice and without costs.

It is respectfully submitted that the suggested procedure by Respondent is in accordance with the established practice.

O'Ryan v. *Mills Novelty Co.*, 292 U. S. 609;
Brownlow v. *Schwartz*, 261 U. S. 216;
Mills v. *Green*, 159 U. S. 651, 657.

Wherefore, Respondent respectfully requests that its cross-motion be granted, as prayed, and that the Petitioners' motion be denied.

September 19, 1943.

Respectfully submitted,

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